No. 86-819

In the Supreme Court of the United States

OCTOBER TERM, 1986

GLOVER BOTTLED GAS CORPORATION, ET AL.,
PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

ROSEMARY M. COLLYER
General Counsel
National Labor Relations Board
Washington, D.C. 20570

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Petitioners contend that the Board violated its procedural rules and the requirements of due process by incorporating the record of a prior unfair labor practice proceeding into the record of a subsequent related proceeding concerning the same parties.

1. a. Petitioners are three corporations that the Board found to be "a single integrated business enterprise and a single employer." Pet. App. D3; see also *id.* at E4-E6. This case concerns events sur-

rounding three separate union certification elections held at petitioners' facilities on September 10-11, 1981, pursuant to petitions filed by Local 282, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. The vote in two of the elections was against the union; the outcome of the third election depended upon the disposition of challenges to three of the ballots. The union filed objections to petitioners' conduct with respect to all three elections; it asserted that petitioners both committed unfair labor practices and illegally influenced the results of the elections. Petitioners objected to the union's conduct in connection with the election in which the outcome was uncertain. The General Counsel of the National Labor Relations Board issued a complaint on the basis of some of the objections and a hearing was held before an administrative law judge. *Id.* at E2-E3 & n.2.

The administrative law judge found that petitioners violated the National Labor Relations Act in that two employees were discharged in retaliation for their union activities (Pet. App. E6-E13), a supervisor interrogated two employees about their intention to join the union (*id.* at E14-E15), and counsel for petitioners engaged in impermissible interrogation of two employees in anticipation of the employees' appearance at the hearing on the charges growing out of the elections (*id.* at E25-E26). As the remedy for these unfair labor practices, the ALJ recommended the reinstatement of the discharged employees and various other forms of relief (*id.* at E30-E32).[1]

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[1] The ALJ also recommended that new elections be held because of this unlawful conduct (Pet. App. E28-E29).

In June 1982, while the hearing regarding the charges discussed above was underway, charges were filed by the union alleging that petitioners had committed additional unfair labor practices. The General Counsel issued a complaint alleging that petitioners had discharged two employees because of their actual or anticipated testimony at the hearing. Following a separate hearing on these charges, the ALJ found that the employees had been discharged in violation of the Act. Rejecting petitioners' claims that the employees were discharged because they had lied to petitioners' attorneys, the ALJ found that the employees were discharged because petitioners believed the employees' testimony would be harmful to petitioners' position on the merits. Pet. App. D10-D16. The ALJ recommended the reinstatement of the employees and various other relief (*id.* at D17-D19).

The Board consolidated the two cases for review. It affirmed the decisions of the administrative law judge and adopted his recommendations in both cases. Pet. App. C1-C6.[2]

b. After the issuance of the complaint relating to the second set of unfair labor practice charges, the General Counsel moved to consolidate these new charges with the complaint that was the subject of

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[2] Prior to its decision, the Board remanded the proceedings to the ALJ for reconsideration of certain credibility determinations (Pet. App. C2). In addition to affirming the ALJ's decisions on the unfair labor practice charges, the Board adopted the ALJ's recommendations regarding the scheduling of new elections (*id.* at C3-C6). That ruling is not a final order under Section 10(e) and (f) of the National Labor Relations Act, 29 U.S.C. 160(e) and (f), and therefore was not before the court below.

the ongoing hearing on the first set of charges.[3] The ALJ acknowledged that the Board's procedures normally require consolidation of all outstanding complaints involving the same respondent. Tr. I, at 2702-2703; see *Peyton Packing Co.*, 129 N.L.R.B. 1358, 1360 (1961).[4] Petitioners objected to consolidation on the grounds that (1) an important witness was ill, and (2) petitioners' counsel might be required to testify in the proceeding on the new charges, and petitioners therefore might be required to obtain new counsel if the cases were consolidated. The ALJ denied the motion to consolidate, but added that in order to obviate any need to "repeat * * * the many days of hearing," the testimony in the first proceeding could be incorporated into the record of the second proceeding (Tr. I, at 2703-2704).

When the hearing in the second proceeding began, the ALJ granted the General Counsel's motion to take administrative notice of the record of the first proceeding and incorporate that record into the record of the second proceeding (Tr. II, at 29-37). Citing *Plant City Welding & Tank Co.*, 123 N.L.R.B. 1146, 1149-1150 (1959), the ALJ rejected petitioners' objections to incorporation, explaining that "[i]t is well established that the Board may take official notice of its own proceedings and decisions and rely thereon including the use of * * * evidence adduced in a prior case, especially where the same parties

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[3] The hearing in the first proceeding began on June 7, 1982 and ended on October 12, 1982 (Pet. App. E1-E2). The complaints in the second proceeding were issued on July 23 and August 13, 1982 (*id.* at D1-D2).

[4] "Tr. I" refers to the transcript of the hearing in the first proceeding. "Tr. II" refers to the transcript of the hearing in the second proceeding.

were present and participated." Tr. II, at 36-37; see also Pet. App. D2 n.2.

2. The court of appeals unanimously upheld the Board's determination in an unpublished order (Pet. App. B1-B3). The court rejected petitioners' contention that they were denied due process because the record of the first proceeding was incorporated into the record of the second proceeding. Noting petitioners' claim that incorporation of the testimony of witnesses who were available to testify in the second proceeding contravened Rule 804(b)(1) of the Federal Rules of Evidence, the court stated that "there is no error in the admission of hearsay testimony at administrative hearings, provided that such evidence bear satisfactory indicia of reliability" (Pet. App. B3 (citation omitted)). The court added that "[i]n any event, [petitioners] have demonstrated no prejudice resulting from the procedure adopted by the ALJ" (*ibid.*).

3. The unanimous decision of the court of appeals is correct and does not conflict with any decision of this Court or another court of appeals. Further review by this Court is not warranted.

a. Petitioners assert (Pet. 9-12) that they were unable to develop evidence relevant to an issue in the second proceeding—the state of mind of Wendy Gilner, one of the discharged employees. That contention is meritless.

First, contrary to petitioners' apparent view, the General Counsel had no obligation to inform petitioners of the types of evidence that might be relevant to the charges in the complaint. To the extent that petitioners' claim is that they failed to adduce this evidence because of their erroneous view of the relevant legal standard, they plainly do not state a due process violation.

Second, Gilner testified at both hearings; petitioners therefore had ample opportunity to examine Gilner regarding the relevant facts. See Pet. App. D3-D10, E19-E20. Petitioners' conclusory claim that they were prevented from adducing facts relevant to the charges contained in the second complaint is insufficient to overcome the express finding of the court of appeals that petitioners failed to demonstrate any prejudice flowing from the ALJ's decision to incorporate the record of the first proceeding (*id.* at B3).[5]

b. Petitioners also contend (Pet. 12-14) that the Board's decision should be set aside because the incorporation of the record of the first hearing violated the Federal Rules of Evidence. The court below properly rejected that claim.

The Federal Rules of Evidence by their terms do not apply to agency proceedings. Fed. R. Evid. 101 ("[t]hese rules govern proceedings in the courts of the United States and before United States magistrates").[6] The Board's rules state that the Federal

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[5] In the decision relied upon (Pet. 9-11) by petitioners, *NLRB* v. *Kanmak Mills*, 200 F.2d 542, 545-546 (3d Cir. 1952), a new charge was added to the complaint at the end of a hearing; the charge alleged in the original complaint was not sustained and the employer was found to have violated the Act on the basis of the charge in the amended complaint. The court of appeals held that in those circumstances the employer had been denied an opportunity to contest the new charge. See also *NLRB* v. *H.E. Fletcher Co.*, 298 F.2d 594, 600 (1st Cir. 1962) ("the Board made a finding of a violation which was neither charged in the complaint nor litigated at the hearing"). Here, by contrast, there was no amendment of the complaint; petitioners were given the opportunity to litigate fully the charges that formed the basis of the second proceeding.

[6] Indeed, the decision cited by petitioner as conflicting with the decision below (Pet. 14) states "[n]ot only is there

Rules of Evidence apply in Board proceedings only "so far as [they are] practicable." 29 C.F.R. 101.10 (a); see also 5 U.S.C. 556(d) ("[a]ny oral or documentary evidence may be received" in an administrative hearing). And the Board has made clear that it may rely upon evidence adduced in a prior case between the same parties (*Plant City Welding & Tank Co.*, 123 N.L.R.B. 1146, 1150 (1959), remanded on other grounds, 281 F.2d 688 (5th Cir. 1960)).

The ALJ did not err by applying that general rule in the present case. The evidence here plainly was reliable—indeed, it was adduced at a proceeding at which petitioners were represented and had an opportunity to cross-examine the witnesses—and petitioners have not shown any prejudice from the procedure followed by the ALJ. There is no warrant for review by this Court of the ALJ's fact-bound determination.[7]

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no administrative rule of automatic exclusion for hearsay evidence, but the only limit to the admissibility of hearsay evidence is that it bear satisfactorily indicia of reliability" (*Calhoun* v. *Bailar*, 626 F.2d 145, 148 (9th Cir. 1980), cert. denied, 452 U.S. 906 (1981)). Since the record had been created at an adversary proceeding between the same parties, that requirement is satisfied here.

[7] The decision cited by petitioners (Pet. 13)—*Union of Operating Engineers, Local 926*, [1985-1986] NLRB Dec. (CCH) ¶ 17,492 (Oct. 22, 1985)—relates only to the admissibility of affidavits. The Board stated (*id.* at 30,078) that "Board precedent establishes that the requirements of Federal Rule of Evidence 804(a) must be met for affidavits of an unavailable witness to be admissible"; it did not address the incorporation of testimony from a prior Board hearing into the record of a subsequent, related proceeding.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

ROSEMARY M. COLLYER
General Counsel
National Labor Relations Board

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